

CANADA / JUDGMENT

R. v. Dodd

2025 BCSC 591

COURT

Supreme Court of British Columbia

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2025 BCSC 591 R. v. Dodd

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dodd,

2025 BCSC 591

Date: 20250227

Docket: 43985-2

Registry: Duncan

Rex

v.

Justin James Dodd

Before: The Honourable Justice Morley

Oral Ruling on Voir Dire #3

Re s. 8 Charter Application

Counsel for the Crown:

T. J. Corsi

Counsel for the Accused:

B.R.B. Morahan

Place and Dates of Hearing:

Duncan, B.C.

February 26-27, 2025

Place and Date of Judgment:

Duncan, B.C.

February 27, 2025

- [1] THE COURT: These are edited oral reasons for judgment in Voir Dire #3 in this proceeding.
- [2] Justin James Dodd is charged on a two-count indictment with possession for the purposes of trafficking fentanyl and methamphetamine. The Crown's evidence derives from a May 19, 2021 search of an apartment in which Mr. Dodd was found (the "Search"). The Search was conducted in execution of a warrant issued by Judicial Justice G. Hayes (the "Warrant"). The Warrant was issued pursuant to s. 11 of the Controlled Drugs and Substances Act [CDSA] and s. 487 of the Criminal Code.
- [3] In the broader voir dire, Mr. Dodd asks me to exclude the evidence obtained in the search under s. 24(2) of the Canadian Charter of Rights and Freedoms. In a prior voir dire, I decided that I was not going to excise any of the components of the Information to Obtain ("ITO"), with the exception of a date. In light of that decision, Mr. Dodd is no longer arguing that there were insufficient grounds to issue the Warrant.
- [4] However, he still puts forward two other arguments for the conclusion that the Search was an unreasonable one contrary to s. 8 of the Charter:
- a) The Warrant authorized a search of "room 301A" of 1030 Government Street. Mr. Dodd says the correct description of the apartment is "Suite 301 of Building A" of 1030 Government Street, and that the actual description was inadequate. In support of this contention, Mr. Dodd points out that the listing on the buzzer for the apartment is "301", not "301A", and the number on the panel beside the door is "301" not "301A". By entering into the apartment on a basis of an authorization to search what he says is the "non-existent" room 301A, Mr. Dodd argues the search was warrantless and therefore, in the absence of exigent circumstances not claimed by the Crown in this case, unreasonable.
 - b) The entry to the building was obtained by the use of a fire key by a plainclothes police officer, who then traversed through the common area, came to a fire door, and opened that to allow the RCMP's Emergency Response Team ("ERT") to access the building and then the apartment. The Warrant does not explicitly give authority to access the common areas of the building. It does give authority to enter the apartment. Mr. Dodd says he has a reasonable expectation of privacy in the common areas of the building and there was not authority to enter those common areas. If this is correct, the Search was a warrantless one and therefore contrary to s. 8 of the Charter.

Background

- [5] The investigative background is set out in the ITO of Constable David Grey which was the foundation of the search warrant. Naturally, these facts will have to be proven at trial if they are to be relied on for the purposes of guilt. However, I do not think they are challenged for the purpose of the voir dire.
- [6] On May 7, 2021, the North Cowichan/Duncan RCMP Street Crime Unit began an investigation into whether drugs, specifically methamphetamine and fentanyl, were being sold out of what the ITO describes as "room 301A" of 1030 Government Street. As the dispute as to whether this description is accurate is at the heart of the application before me, I will neutrally refer to the target suite as the "Apartment".
- [7] The legal description of 1030 Government Street is Lot 1, Plan VIP282808, Section 19, Range 5, Quamichan Land District except Plan VIP3284RW, that part within the boundary of the City of Duncan. It has a PID of 002-017-083.
- [8] There are two four-storey buildings at the municipal address of 1030 Government Street and on that legally described property. Each has either exactly or approximately 50 units or suites. Many of these have balconies. The two buildings are known to the police witnesses and to the affiant on behalf of Mr. Dodd, Samara Graves, as Building A and Building B. Building A, at least, has a sign with a large "A" in black on a white background outside the front door near the buzzer panel.
- [9] I will take it that references to Building A and Building B are uncontroversial and I find as a fact that they have the same municipal address and are part of the same lot. Building A is the subject building and it is the one closer to the road, closer to Government Street.
- [10] The buzzer system has been replaced since the time of the Search. At the time, the buzzer/code box at the building front door had a number of buzzers next to a strip of white paper with the room/suite/apartment numbers to the left of a black vertical line with either a name or the word "occupied" or, in some cases, nothing at all to the right of the vertical line. In each case, there were numbers only and the numbers did not include the letter "A" or, presumably, in the case of Building B, the letter "B".
- [11] The Warrant in this case was executed on May 19, 2021, at around 8:00 p.m. The Emergency Response Team conducted what is known as kinetic entry. There were between eight and ten members of the ERT deployed, all armed with semiautomatic rifles. Constable Smith, in plainclothes, who was part of the investigative team, used the building's fire key to obtain access to the front lobby. He confirmed in cross-examination that he did not ask for consent from the building manager or anyone else.

- [12] After he entered the building, Constable Smith went to a fire door in a stairwell on the north side of the building, which is the opposite side from the Apartment. When the ERT team was ready, he opened the door to allow them access. The ERT members entered through the fire door and went up the stairwell to the third floor. They then moved in single file southwards across the third floor to the door of the Apartment. The reason for doing this was to minimize the risk of detection by the occupants of the Apartment prior to the Search.
- [13] Once they were in a position outside the door, the officer with the ram announced, "Police, Search Warrant." He then used the ram to break the door jamb and open the door. When the ERT entered, they found two people in the Apartment, one a female person and the other Mr. Dodd. They handcuffed both the occupants, secured the Apartment, and turned it over to the investigative team, who continued with the Search.

Analysis

- [14] In a criminal prosecution, an accused person who argues that evidence against them has been obtained in a manner that infringed or denied their Charter rights may apply to have that evidence excluded under s. 24(2) of the Charter. The court shall exclude that evidence if it was obtained in a manner that infringed or denied those rights, and if admitting it would bring the administration of justice into disrepute.
- [15] What is before me right now is the first part of that inquiry, whether the evidence was obtained in a manner that infringed or denied Mr. Dodd's Charter rights.
- [16] Section 8 of the Charter guarantees everyone the "right to be secure against unreasonable search or seizure". In this case, there is no question that the evidence that the Crown ultimately will seek to use to prove its case against Mr. Dodd was obtained through a search of the Apartment nor is there any issue that he had a reasonable expectation of privacy in that apartment. Therefore, if the Search was "unreasonable", the evidence against him would have been obtained in a manner that infringed or denied his Charter rights and should be excluded if admission would bring the administration of justice into disrepute, to be determined in what is usually called the s. 24(2) inquiry. This will be argued later if I find a breach of s. 8.
- [17] According to *R. v. Collins*, [1987] 1 S.C.R. 265, 1987 CanLII 84, there are three ways the search or seizure may be unreasonable: at 278. The one that is relevant to us here is that a search is unreasonable if it is not authorized by law. Search powers may derive either from common law or from statute. If the basis for the search power is a statute, the statute must be complied with. In this case, the alleged bases for the search was s. 11 of the CDSA and s. 487 of the Criminal Code.
- [18] The requirements of ss. 11 and 487 in this case are ones that are also required by the Charter jurisprudence dating back to *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, 1984 CanLII 33 [Hunter]. They are:

- a) First, that at least in the absence of exigent circumstances, searches of a dwelling place must be result of prior authorization by a judicial official on receipt of sworn evidence from a peace officer setting out reasonable grounds to believe there is evidence of an offence in the building, place, or receptacle to be searched (a "warrant").
 - b) Second, that the warrant must specify the place to be searched (in this case; in other cases, it may be a receptacle or building to be searched).
 - c) Third, that the justice issuing the warrant be satisfied by information on oath that there are reasonable grounds to believe, in the case of s. 11 of the CDSA, that a controlled substance, or a thing that will afford evidence in respect of an offence under the CDSA is in the place. That is CDSA, ss. 11(1)(a) and (d).
- [19] A search of a place other than the place specified in the warrant is not authorized by that warrant.
- [20] In this case, both the issues arising here come out of the place requirement in both s. 487 of the Criminal Code and s. 11 of the CDSA. The first is that Mr. Dodd alleges that the description of the place, namely room 301A of 1030 Government Street, is inaccurate or at least inadequate, and that therefore the search of the Apartment itself was warrantless.
- [21] The second issue is that the Warrant does not specifically authorize entry into the common areas of the building. Mr. Dodd argues that implied authorization is not possible or at least not available in these circumstances, and therefore the entry into the common areas of the building, at least without the consent of the building management or any of the residents of the building, was unlawful.

Is the Place of Search Adequately Described?

- [22] I will start with the question of whether the place of search is adequately described. As a principle of law, a warrant that does not adequately describe the place to be searched is invalid: *R. v. Ting*, 2016 ONCA 57 at para. 50 [Ting]. In this case, the Warrant describes the place or premise to be searched as "room 301A of 1030 Government Street, Duncan, British Columbia." The issue, therefore, is whether that description is adequate.
- [23] In *Ting*, the Ontario Court of Appeal said the following about adequacy of description:
- [51] Just what constitutes an adequate description will vary with the location to be searched and the circumstances of each case. With respect to a multi-unit, multi-use building, as seen in this case, it is not enough to simply provide a street address that distinguishes the building from others. The description must adequately differentiate the units within the building ...
- [24] In other words, whether a description of a place is "adequate" turns on whether it differentiates the place to be searched, for which there are the prerequisites of a warrant, from other places that are not authorized to be searched and for which there are not those prerequisites. If there is any ambiguity, the warrant is invalid, regardless of whether there were reasonable grounds in relation to the actual target and only the actual target was

searched. This non-ambiguity requirement may not be the only requirement of adequacy, but it is the primary one found in the caselaw and it is the one that I think is at issue here. Since descriptions of places are inherently contextual, whether there is an unacceptable ambiguity has to be judged in light of what the Ontario Court of Appeal refers to as the circumstances of the case.

[25] Adequacy of this differentiation is a pragmatic inquiry judged from three perspectives:

- a) First, the authorizing justice must be able to tell, from the description, the spatial boundaries within which he or she is authorizing a search or entry.
- b) Second, the executing officers executing the search warrant must be able to tell from the description the spatial boundaries within which they may enter and search.
- c) Third, persons looking at the warrant after the fact, (typically, but not necessarily, an accused person or their lawyers) must be able to tell from the description the spatial boundaries within which the search was authorized.

[26] Those purposes are set out in *Ting* at para. 49 and have been adopted in this jurisdiction in *R. v. Kennelly*, 2023 BCSC 2519 at para. 40. I might add, as well, that if a warrant is provided to an occupant or owner, that person has to be able to tell whether the police have the right to enter and search their premises as opposed to someone else's.

[27] In the case of multiple units within a single building, therefore, the description must unambiguously differentiate the unit that may be searched from those that may not be searched. Equally, in the case of corresponding units in different buildings, the description must unambiguously differentiate the building in which the unit to be searched is located.

[28] The adequacy of the description is therefore judged based on these purposes, in light of the circumstances. A description must be as precise as necessary to avoid the inadvertent search of wrong premises, or granting too broad an authorization, or difficulty on the part of a challenger to challenge the authorization.

[29] The "circumstances" are relevant because the same description may fulfil these purposes in one case and not in others. For example, in a detached building in which a single person lives, it will presumably be sufficient to use the street address of the building as also the description of the place to be searched. However, this will not be sufficient where there are multiple residences within a single building. In some cases, a unit number will be available to disambiguate, but in other cases, it will not, and some more detailed verbal description will be required.

[30] In some cases, a municipal address will not be available or, if available, will not be unambiguous, and then a description might require a lot number, a map, or a complicated verbal description. In every case, the issue is whether the consequent referent is one that is unambiguous.

- [31] The non-ambiguity of the description must be determined "objectively". In each case, the description must be unambiguous with regard only to publicly available information. It cannot be made unambiguous as a result of information that appears only in the ITO or to which the justice, the police, or for that matter even the subsequent challenger have private access because of what they peculiarly know as individuals.
- [32] The question is therefore not whether the actual justice, police officer, or subsequent challenger would be able to differentiate the place to be searched from other places, but whether a hypothetical justice, police officer, or challenger, without any special or private knowledge and without access to the ITO, would be able to do so.
- [33] At the same time, it has to be recognized that no description could ever be informative without some sort of context, and typically descriptions of places require fairly local knowledge or context. Therefore, "common" or publicly-available knowledge must be attributed to the hypothetical justice, police officer, or challenger. The common knowledge may be quite local, and so might actually be familiar to only a relatively small number of people, but it should be available to people who do not have access to police powers of investigation or information that would only be available to the occupier of the premises.
- [34] In this case, the crucial background fact is that there are two buildings with the municipal address of 1030 Government Street and they are referred to as Building A and Building B. In each building, the rooms and suites are just marked with numbers and the buzzers are also just marked with numbers. There are no suites in these buildings with letters on the signs next to the door.
- [35] A person who knew all of these facts would have no difficulty disambiguating room 301A, 1030 Government Street, Duncan. If you knew those facts, there is no other way of interpreting room 301A, 1030 Government Street. It would inevitably be, since you would know that the individual suites were not differentiated with letters, that would not be a possible explanation. And since you would know that there are two buildings and one of them is A, you would know that room 301A, 1030 Government Street, Duncan, would have the same referent as room 301, Building A, 1030 Government Street, Duncan. There is no other reasonable inference that a person who knew these things could arrive at.
- [36] The question therefore is whether these facts are common or public knowledge.
- [37] The existence of two buildings with the municipal address 1030 Government Street, Duncan, and the fact that these buildings are marked A and B, are very clearly public knowledge. They may be local knowledge, in the sense that it is unlikely that many people outside of Duncan are aware of these things, but they are available to anyone who took the time to observe the two buildings. One would not need to have the special powers of police investigation or rights unique to a property owner or occupier to determine either of these facts.

- [38] It is true, as Mr. Morahan emphasized, that Sergeant Minkley, who commanded the ERT unit and executed the warrant, did not know of these facts before he planned the execution of the Search. He testified that he found out that the building he was targeting was the A building prior to looking at the warrant and, as a result of discussions with the investigative team. He testified that that was his primary reason for understanding that the A in 301A on the warrant meant Building A.
- [39] However, the issue is not how the officers executing the warrant in fact found out about the background knowledge necessary to understand the place description, but whether the background knowledge was publicly available. Sergeant Minkley, as a matter of fact, happened to find this out from talking to the investigative team, but that in itself is not unusual. It will often be the case that a tactical team executing a warrant will obtain information from investigating officers that may be public information. They might determine where to turn onto what road or other information they might well find out from the investigative officers. I expect that is common. What matters is not how the executing officers actually found out the purportedly common knowledge, but how they could have found it out. If the only reasonable way they could have found it out is from knowledge that only investigators would have in their possession, then it is not common knowledge. But if they could have found it out from public sources, then it would be.
- [40] Whether the fact that the suites within the buildings are marked only by numbers was public knowledge is perhaps less obvious. It was known to both of the Duncan RCMP officers who testified. It would be known to anyone who had been inside either of the buildings. It would presumably be known to an occupant of any of the buildings. It is consistent, as well, with the way that suites are ordinarily designated, at least in large apartment buildings in British Columbia.
- [41] There was no evidence put to me that this was information that could not have been obtained publicly, and it was not put specifically to the officers. I put some weight on the fact that this is a standard way that suites are designated in large apartment buildings, and that it would also be apparent to someone who looked at the buzzers. Taking into account that the onus of proof in an application under s. 24(2) is on Mr. Dodd, I find that the more likely inference was that the numbering system here was public knowledge, in the sense that it would not require the special powers of a police investigator or the special knowledge of the property owners.
- [42] It was put to Constable Grey in cross-examination that he did not check whether this form of address was used by Canada Post or the City of Duncan in its civic capacity. He confirmed that he did not check this, but he also did not know the answer, so there is no evidence of how either entity would handle an address of 301A, 1030 Government Street.
- [43] I note that in all the cases relied on by Mr. Dodd, the description of the place to be searched was either wrong in a very straightforward sense, for example the number was wrong and the correct address was a different number, as in *R. v. Silvestrone*, 66 C.C.C. (3d) 125, 1991

CanLII 5759 (B.C.C.A.), or *R. v. Pampera*, 2022 ONCA 668, or the description was ambiguous and could have referred to, and there was evidence that it could have referred to, other places for which there was no basis to search. *R. v. Golschesky*, 2013 SKCA 116 and *Ting* are both examples of ambiguity.

- [44] In none of the cases in which a description was found to be inadequate could the place be uniquely determined based on the description and publicly-available information. Where that was possible, the description in the warrant was upheld, even if another description was possible and perhaps might have been better: see, for example, *R. c. Charles*, 2010 QCCQ 9178.
- [45] I find, therefore, on a balance of probabilities, that the description of 301A, 1030 Government Street was a sufficiently particularized, adequate description for the purposes for which places are described in search warrants. I therefore find that the Warrant was consistent with s. 11 of the CDSA and s. 487 of the Criminal Code in this respect and, since there is no other challenge to the validity of the Search of the Apartment itself, that Search was a valid one.

Is the Lack of Express Authorization to Enter the Common Areas Without Consent a Breach of Section 8?

- [46] I then turn to the question of whether the lack of express authorization to enter the common areas of the Building A without consent constituted a breach of Mr. Dodd's s. 8 Charter rights.
- [47] The evidence was that the Duncan RCMP have two ways to access apartment buildings without the assistance of management or a tenant and without using forcible entry. In their detachment, they have keys to various apartment buildings in Duncan, including both buildings of 1030 Government Street. They, along with other first responder services, also have a "fire key", which allows the holder to open a fire box with the front door key inside of it. The fire key opens all such boxes in the city.
- [48] On May 19, 2021, Constable Smith volunteered to get access to the building for the ERT. He decided to use the fire key so that other members of the detachment could still use the building-specific key to respond to other calls. He used the fire key to open the fire box and then opened the front door. He did this in plainclothes. He then went down to the stairwell as I have described on the north end of the building, to prop open a side door so that the ERT could have access.
- [49] Mr. Dodd argues that this aspect of the Search was not authorized by law because the search warrant did not expressly allow access to the common areas. He also argued in his written material, though there was no stress on this in oral argument before me, that it was also unreasonable because the use of the fire key was unauthorized and created a risk that fire or ambulance responders could not access.

- [50] I do not consider that the fire or ambulance issue has been made out, because Constable Smith's evidence was that he was available to let the fire or ambulance in if they had needed access during the course of the Search. When he entered into the Apartment, there was an officer at the front door who would have been available in that event. Although Constable Smith does not specifically remember when he returned the key to the fire box, he said he was confident that he did so that evening and I find, on a balance of probabilities, that he did. There is no real reason to think otherwise, and so there was no time at which the fire or ambulance could not have accessed the building.
- [51] However, it is clear that Constable Smith did not seek consent from building management to enter the common areas or to let the ERT in through a fire door, and he testified that he did not consider that necessary and he did not do so. He also did not ask another resident or anyone else for the right to enter.
- [52] Clearly, if this were done by a private citizen without any legal authority at all, then it would be a trespass. If it had been expressly authorized by the warrant, then there would be no constitutional issue, at least if the warrant itself was not successfully challenged.
- [53] But in this case, because the Warrant did not expressly authorize the entry, I must ask:
- a) whether Mr. Dodd had a reasonable expectation of privacy in the common areas, in which case, it would be a search; and
 - b) if it was a search, whether the warrant or some other doctrine could provide authority for the search in the absence of a specific reference to the common areas as part of the place to be searched.

Mr. Dodd had a reasonable expectation of privacy in the common areas

- [54] In *R. v. White*, 2015 ONCA 508 [White], the Ontario Court of Appeal held that residents in a multi-family building can have a reasonable expectation of privacy in relation to common areas of their buildings that are inaccessible to the general public. *White* arose in the context of surveillance by an officer within those areas prior to obtaining a warrant. In that situation, reasonable expectations will be somewhat contextual as the Ontario Court of Appeal noted at para. 41. So, it will depend on the severity of the surveillance. In *White*, the expectation of privacy that was being referred to would be what the Supreme Court of Canada in *R. v. Tessling*, 2004 SCC 67 at para. 20 [Tessling], referred to as informational privacy.
- [55] In this case, the real issue is the entry by a police officer in the context of a kinetic search without the consent of the building manager or any resident. As I have mentioned, that would obviously be a trespass at common law.

[56] In *Tessling*, the Supreme Court of Canada differentiated between personal, informational, and territorial privacy: at para. 20. While what was at stake in *White* was primarily informational privacy, s. 8 of the Charter also protects territorial privacy.

[57] The definition of territorial privacy and the fact that it lies along a spectrum was set out at para. 22 of *Tessling*:

The original notion of territorial privacy ("the house of everyone is to him as his castle and fortress". *Semayne's Case*, [1558-1774] All E.R. Rep. 62 (1604), at p. 63) developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private activities are most likely to take place (*Evans*, *supra*, at para. 42; *R. v. Silveira*, 1995 CanLII 89 (SCC), [1995] 2 S.C.R. 297, at para. 140, per Cory J.: "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'"; *R. v. Feeney*, 1997 CanLII 342 (SCC), [1997] 2 S.C.R. 13, at para. 43), in diluted measure, in the perimeter space around the home (*R. v. Kokesch*, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3; *R. v. Grant*, 1993 CanLII 68 (SCC), [1993] 3 S.C.R. 223, at pp. 237 and 241; *R. v. Wiley*, 1993 CanLII 69 (SCC), [1993] 3 S.C.R. 263, at p. 273), in commercial space (*Thomson Newspapers Ltd. v. Canada* (Director of Investigation and Research, Restrictive Trade Practices Commission), 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425, at pp. 517-19; *R. v. McKinlay Transport Ltd.*, 1990 CanLII 137 (SCC), [1990] 1 S.C.R. 627, at pp. 641 et seq.), in private cars (*Wise*, *supra*, at p. 533; *R. v. Mellenthin*, 1992 CanLII 50 (SCC), [1992] 3 S.C.R. 615), in a school (*R. v. M. (M.R.)*, 1998 CanLII 770 (SCC), [1998] 3 S.C.R. 393, at para. 32), and even, at the bottom of the spectrum, a prison (*Weatherall v. Canada* (Attorney General), 1993 CanLII 112 (SCC), [1993] 2 S.C.R. 872, at p. 877). Such a hierarchy of places does not contradict the underlying principle that s. 8 protects "people, not places", but uses the notion of place as an analytical tool to evaluate the reasonableness of a person's expectation of privacy.

[Emphasis in original.]

[58] In my view, the decision of the Ontario Court of Appeal in *White* supports the proposition that common areas of a multi-unit building not accessible to the general public are somewhere in this spectrum of territorial privacy between "the perimeter space around the home" addressed in *R. v. Kokesch*, [1990] 3 S.C.R. 3, 1990 CanLII 55, and a shared space in a residential unit in which roommates cohabit. As *White* suggests, there may be more discrete divisions along the spectrum since the expectation of privacy is greater in buildings with fewer persons able to access these common areas, which would be closer to a roommate situation, leading to cases as in this case in which dozens or possibly even hundreds of people have the right to access.

[59] But this is just a question of where along the spectrum of territorial privacy it lies. In any case, where there is a discrete group of people who have the right to access and there is a lock, there will be some level of territorial privacy. Some entries might not infringe that. Consent entries would not. But a forcible entry in the form that took place here, I find, would infringe basic expectations of territorial privacy. It is, I find, both an objectively

reasonable and a subjectively held expectation that groups of armed people would not enter into the common areas of a building through a fire exit stairwell in a way that amounts to a trespass.

If There Was a Search, Only a Warrant Could Authorize It

[60] The only possible legal authority to enter private property without consent is either an implicit licence (not in issue here) or a warrant. Under the principles in *Hunter*, prior judicial authorization is presumptively necessary as a constitutional matter in the absence of exigent circumstances to breach reasonable expectations of privacy in a building, particularly a residential building. Further, s. 487 of the Criminal Code, on its face, by requiring that a "building" be named before there can be a search, requires a warrant or some other form of authority to be derived from a statute, before there can be entry without consent.

[61] At common law, a warrant was a defence to what would otherwise be a trespass. As William Pitt, the Younger, put in a debate over searches in enforcement of cider excises in the 18th Century:

The poorest man [in his cottage may] bid defiance to all the forces of the Crown. [The cottage] may be frail-its roof may shake-the wind may blow through it-the storm may enter-the rain may enter, but the King of England cannot enter! - all his forces dare not cross the threshold of the ruined tenement!

[62] At common law, a warrant provides an exception to the principle that the forces of the state cannot enter into private property in circumstances that would be a trespass if done by an ordinary citizen. While not all trespasses are "searches", where they are and when no authority to engage in them exists, the search is unlawful and therefore "unreasonable".

Implicit Authorization

[63] Since there is no express authority to enter the common areas of the building in the Warrant, and no other legal authority, the Search must be "unreasonable" unless the Warrant implicitly authorized entry into the common areas, as argued by the Crown.

[64] The Warrant states in relevant part:

AND THAT there are reasonable grounds to believe that the Said items or some part of them are in room 301A of 1030 Government Street, Duncan, British Columbia.

THIS IS THEREFORE to authorize and require you to enter the said place or premise between the hours of 5:00 pm on May 19, 2021 and 11:00 pm on May 19, 2021 and upon entering to search for and seize the things ...

[65] The "said place or premise" is "room 301A of 1030 Government Street". In light of my previous discussion, this is clearly authorization to enter the Apartment.

- [66] The Crown argues that by necessary implication, it must also be authorization to enter the common areas of the building, based on the fairly common sense point that it is impossible to enter an apartment of this type without entering the common areas.
- [67] Mr. Dodd responds that the concept of implied authorization contradicts the prior authorization principle in *Hunter*.
- [68] I would not go this far. I accept that, as a general principle of law, an authorization to do a thing includes authorization to do those things that are necessarily incidental to the thing authorized. So, for example, authority to enter a house would be authority to enter the property to access the house, even if, for example, an implied invitation was revoked.
- [69] However, this principle is a dangerous one and should not be allowed to grow into authorization for what is convenient or useful or even "reasonably necessary" to do the expressly authorized act. It has to be limited to what is necessary in the strictest sense to do the expressly authorized act. If there is a way to do the expressly authorized act without doing the purportedly implicitly authorized act, then the act is not implicitly authorized. If it were to go further, then it would indeed be the end of the *Hunter* principle because the police would not need to seek authorization for all that they were doing.
- [70] In the context of multi-unit residences in general, and in this case in particular, it is at least possible (if perhaps not desirable for law enforcement reasons) to request access to the common areas from the building management, assuming there is no reasonable grounds to assume they are the targets of the search. It is a matter of ordinary experience that building management will at least sometimes be cooperative with law enforcement. If building management give that access, there is no trespass, and therefore no warrant is necessary. There is already legal authority.
- [71] Doing it this way would not intrude on the territorial privacy of the residents, since they have no expectation to exclude those invited into the common areas by the building management. (It might, in some contexts, intrude on their informational privacy, but that is another matter and depends on whether the investigation goes beyond observing things in plain view.) It requires no specific authority, statutory authority, for the police to obtain entry into common building areas with the consent of building management.
- [72] Precisely because getting permission is a possibility, it cannot be said that authorization to enter the common areas without that consent is necessarily incidental to authorization to enter an apartment without consent, and therefore the Crown's analogy to entering onto the property of a householder who is the target of a search fails.
- [73] Mr. Corsi points to the importance of operational flexibility when executing search warrants, and I accept that that is indeed important. It would be unfortunate if search warrant authorizations were such that they interfered with the necessary tactical flexibility of those who have the expertise to execute them, sometimes in dangerous situations.

- [74] But there are options. First, the ITO affiant could disclose the police strategy to the justice and, if it requires entry without notice to building management, then the justice can approve that approach. If ITO affiants do not provide a basis for entry into common areas, they will either have to try to obtain management permission or perhaps return to a justice as to why this is not practicable and request a new authorization. In the event there are actually exigent circumstances during the course of the search, that could provide an exception to the warrant requirement under generally accepted principles.
- [75] So I do not see any reason that this would hamstring law enforcement. Since the purpose of s. 8 of the Charter is to have a reasonable balance between the needs of law enforcement and the reasonable expectations of privacy of the citizenry, I do not see why extending the principle of prior approval to prior approval to enter common areas of a multi-resident building would contradict that. If Parliament felt otherwise, of course, it could have created a broader authority by legislation, subject to a constitutional challenge to that provision. It should not be for the courts to create a broad licence as a matter of common law.
- [76] Explicitly setting out the nature of the intrusion on territorial privacy that is requested to be authorized does not mean setting out in detail an inflexible tactical plan. All that is needed is a clear road map of what intrusions are being requested in order to obtain access to the target place.
- [77] I therefore do not accept the broad principle that authorization to enter a unit in a multi-unit building is authorization to enter the shared areas that are normally inaccessible to the public. Rather, this is an additional intrusion into territorial privacy and it must be specifically authorized for the search to be in accordance with law.
- [78] In this case, the Warrant did not authorize the entry into the common areas, and therefore the entry into those common areas without the consent of building management or a resident was not in accordance with law. That was a component of the Search. Therefore, the Search, taken in its totality, was not fully authorized by law and was, to that degree, unreasonable and in breach of Mr. Dodd's s. 8 Charter rights.
- [79] My findings, therefore, are as follows:
- a) First, the description of the place to be searched in the Warrant as room 301A of 1030 Government Street was an adequate description and the Search was not invalid for that reason;
 - b) The failure to authorize entry without consent into the common areas of Building A of 1030 Government Street was not in accordance with law, and therefore that entry was a warrantless search within the meaning of s. 8 of the Charter.
- [80] I invite submissions from Mr. Dodd and the Crown tomorrow on the implications of these findings for s. 24(2) of the Charter.

"J. G. Morley, J."

The Honourable Justice Morley

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